TREGERS INDUSTRIES (PRIVATE) LIMITED
versus
COMMISSIONER GENERAL OF THE ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
GARWE JP
HARARE, 6 October 2005 and 26 July 2006

Opposed Application

Mrs *J.B. Wood,* for the applicant
Mr *A.B.C. Chinake,* for the respondent

GARWE JP: In this application Tregers Industries ("the applicant") seeks a refund of the sum of $2,183,861,227-71 paid by its bankers to the Zimbabwe Revenue Authority ("the respondent") at the instance and instructions of the respondent. The application is opposed.

The applicant is in the business of manufacturing and selling products both locally and internationally. On 28 May 2004 an officer from the respondent's offices visited the applicant's offices and inspected the applicant's export files. The officer discovered that the applicant was not charging value added tax and called upon the applicant to pay. The applicant contended that it was not liable to pay and consequently the respondent proceeded to garnishee the applicant's current account with Barclays bank. A total sum of $2,184,861,227-71 was paid to the respondent by the bank. The applicant now seeks a refund of that sum on the basis that the exported goods were not liable to value added tax. Specifically the applicant contents that the goods in question had a zero rating in terms of section 10 of the Act.

In its founding affidavit, the applicant says it has been exporting its finished products over the years and has been exempted from charging sales tax on the goods to be exported. When the system changed to value added tax, the applicant understood that nothing had changed and that it was not required

to charge value added tax on its export orders. The export documents were presented to the respondent's office who after examination would authorise the exportation without requesting that value added tax be charged on the invoices. This went on for some time. In this particular case the goods had already been exported and the customer had already received the invoices and statement. In the circumstances it was therefore no longer possible to re-invoice the customer who was outside the country and expect him to pay. The applicant accordingly seeks a refund of the sum garnished together with interest thereon at the prescribed rate from the date the money was transferred from the applicant's account together with costs on the higher scale.

The respondent, in its opposing papers, accepts that all exports were exempted from sales tax in terms of section 9(1) of the Sales Tax Act. However with the promulgation of the Value Added Tax Act (which simultaneously provided for the repeal of the Sales Tax Act) as well as the VAT Regulations (SI 273/03), certain changes were made. In this particular case the goods were not consigned to a foreign country – as provided for in the definition of "exported" in section 2 of the Act. Value added tax should therefore have been collected by the applicant in terms of section 6(a) of the Act. Direct exports are "zero rated" in terms of section 2(a) of the Act whilst indirect exports are taxable under section 2(d) as read with section 11 of the Regulations. Accordingly the respondent denies that it acted unlawfully in issuing a garnishee order against the applicant. In terms of section 49 of the Act, the liability of paying VAT, where this has not been collected, lies with the registered operator. The respondent submits that the applicant deliberately used the same approach it used during the sales tax era where all exports were exempt without checking the correct position in terms of the new Act.

The main issue for consideration is whether in this case the applicant was obliged in terms of the law to collect value added tax. Quite clearly if the applicant was obliged to do so and did not, the respondent would be entitled to recover any amount calculated as being due by way of value added tax. Section 48 of the Value Added Tax authorises the Commissioner to recover money from various sources including a bank account.

Two other matters were raised in *limine.* These are firstly whether the deponent to the opposing affidavit had authority to depose to that affidavit and secondly whether the respondent himself has been correctly cited. I propose to deal with these two issues before dealing with the contentious issue whether the applicant was obliged to charge and collect tax in this particular instance.

The deponent to the respondent's opposing affidavit, Susan Meda states as follows in paragraph 1 and 2:-

> "1. I am a legal officer in the Zimbabwe Revenue Authority, a duly constituted legal entity ....
>
> 2. The facts I depose to herein are within my personal knowledge or have been ascertained by me through reports received from the investigating officer. As such I can properly swear to this affidavit, which, to the best of my belief, is true and correct."

It is the applicant's contention that Susan Meda has apparently arrogated to herself the function to depose to an affidavit but does not state that she has authority from the respondent to act on his behalf. It is true that Susan Meda has not in her affidavit specifically stated that she has been authorised to depose to the affidavit. She states however that she is a legal officer in the employ of the respondent and that she can properly swear to the affidavit which to the best of her knowledge is true and correct. In my view, implicit in that statement, is the fact that she

has authority to swear to the affidavit. I do accept that it would have been neater for Susan Meda to have expressly stated so. Her failure to do so however cannot nullify the opposing affidavit as has been suggested. In other words the failure to specifically state that she had been authorised to depose to the affidavit is not fatal. I would accordingly dismiss the first point *in limine*.

The second point raised *in limine* is whether the respondent has been correctly cited. The respondent says it is the Zimbabwe Revenue Authority which should have been cited and not he himself. The applicant on the other hand has submitted that the Commissioner General has been correctly cited because he and not the Authority is responsible for administering the Act by virtue of sections 4 and 44 of the Act. Section 4 of the Act is clear that it is the Commissioner who shall be responsible for carrying out the provisions of the Act. It is also true that any refunds in terms of the Act should be refunded by the Commissioner.

Richard Maradze & Ors v The Chairman, Public Service Commission & Anor HH 223-98 is authority for the proposition that in cases such as the present it is the body and not the head of that body who should be cited. SMITH J in that judgment cited with approval remarks by ADAM J in *Hardlife Matide v Chairman of the Public Service Commission & Anor* HH 90-98 at page 2 of the cyclostyled judgment that:-

> "…. The Chairman of the Public Service Commission was so cited. Although exception was not taken thereto, I consider that it was improper to cite him as respondent. Section 74 of the Constitution establishes the Public Service Commission which consists of the Chairman and not less than two and not more than seven other members. Any findings, rulings or decisions of the Public Service omission are those of that body and not of the Chairman. Accordingly the Chairman of the Public Service Commission cannot do anything in the name of the Commission if the majority of members do not agree with him. The distinction is illustrated by the order sought by the applicant. The draft order states that the respondent's

> decision to find the applicant guilty of misconduct should be set aside. However, the finding of guilty was not a decision of the respondent. It was a decision of the Public Service Commission. I therefore consider that it was improper to cite the Chairman as respondent. The Public Service Commission should have been cited as respondent."

In the above case SMITH J remarked at pages 7-8 that it was not appropriate to cite the chairman of the Public Service Commission as a party unless the allegation is that he personally acted in a manner which necessitated recourse to the courts.

I agree with the sentiments expressed in the two cases cited above. Ordinarily there is no basis for citing the Commissioner personally as a party in a matter handled by employees of the authority. I am fortified in this view by the provisions of the Value Added Tax [*Chapter 23:12*] as well as the Revenue Authority Act [*Chapter 23:11*]. The latter Act provides in section 5 that the operations of the Zimbabwe Revenue Authority shall, subject to the Act, be controlled and managed by a board which shall consist of the Secretary for Finance, the Commissioner General of Zimra and other members appointed by the Minister after consultation with the President. In terms of section 4 one of the functions of the Authority shall be to act as an agent of the State in assessing, collecting and enforcing the payment of all revenue. Of particular importance is section 3 of the Revenue Authority Act which provides:

> "3. There is hereby established an authority, to be known as the Zimbabwe Revenue Authority, which shall be a body corporate capable of suing and being sued in its own name and, subject to this Act, of performing all acts that bodies corporate may by law perform."

It is the Authority which in terms of section 4 is charged with the responsibility of *inter alia*, collecting and enforcing the payment of all revenues. In terms of section 19 of the Revenue Authority Act, it is the board of the Authority which appoints the Commissioner

General of the Authority. However in terms of section 3 of the Value Added Tax, it is the Commissioner General of the Authority who is responsible for carrying out the provisions of the Act. Section 5 of the same Act provides that the Commissioner General may, subject to the Revenue Authority Act, delegate functions to officers in the employ of the Authority. That the Commissioner General acts under the control of the Board of the Authority there can be no doubt. Section 19(4) of the Revenue Authority Act provides that the Commissioner General shall be responsible, subject to the Board's control, for supervising and managing the authority's staff, activities, funds, etc. As already noted, section 5 of the Revenue Authority Act provides that the operations of the authority shall be controlled and managed by the Revenue Board and section 19(4) makes it clear that the Commissioner General's position is akin to that of a chief executive in a company. He is appointed by the Board of Authority which Board also appoints commissioners and other officers and members of staff. Although there is specific reference in the Value Added Tax Act to the Commissioner being responsible for carrying out the provisions of the Act, it is clear that such responsibility is subject to the control and management of the authority through the Revenue Board. At the end of the day it is the authority that is specifically given the power to sue or be sued.

In the circumstances, I find that the Commissioner General of the Authority has been wrongly cited as the respondent and it is the authority itself that should have been so cited. I accordingly uphold the point raised *in limine* by the respondent and on that basis alone would dismiss the application.

The above notwithstanding I proceed to consider whether or not as a matter of law the applicant was obliged to collect tax in the particular circumstances of this case.

Section 10(1)(a) of the Value Added Tax provides as follows:

"10. ZERO RATING

(1) Where, but for this section, a supply of goods would be charged with tax at the rate referred to in subsection (1) of section *six,* such supply of goods shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero *per centum* if -

(a) the supplier has supplied the goods, being movable goods, in terms of a sale or instalment credit agreement and has exported the goods; or …."

A supplier is defined as "the person supplying the goods or services".

In terms of section 2 of the Act, which is the definition section, the word "exported", in relation to any movable goods supplied by any registered operator under a sale or an instalment credit agreement means:

"(a) consigned or delivered by the registered operator to the recipient at an address in an export country as evidenced by documentary proof acceptable to the commissioner; or

(b) ….

(c) ….

(d) removal from Zimbabwe by the recipient, who is not a resident of Zimbabwe, for conveyance to an export country, subject to such conditions as may be set by the Commissioner by notice in a statutory instrument."

Section 11 of the Value Added Tax (General) Regulations SI 273/03 provides:

"11 Subject to paragraph (a) of subsection (1) of section 10 of the Act where goods are consigned or delivered in terms of paragraph (a) or (b) of subsection (1) of section 2 of the Act in the definition of "exported", tax shall be charged at zero *per centum*.

11A Subject to paragraph (a) of subsection (1) of section 10 of the Act where goods are consigned or delivered in terms of paragraph (d) of subsection (1) of section 2 of the Act in the definition of "exported" tax shall be charged at zero *per centum*:

Provided that –

(a) registered operators seeking to benefit from zero rating of goods sold to non-residents in terms of paragraph (d) of the definition of "exported" shall satisfy the Commissioner that they will comply with all exchange control regulations relating to export of goods;

(b) where the Commissioner is satisfied that the goods referred to in paragraph (d) of the definition of "exported", were not taken out of Zimbabwe, the seller of such goods shall become liable to the tax calculated at the prescribed rate;

(c) the tax shall –
  (i) be debts due by the seller to the State; and
  (ii) be sued for and recovered by action by the Commissioner in any court of competent jurisdiction ."

So far as this case is concerned the position in terms of the various provisions is as follows:

(a) Tax shall be charged at zero *per centum* where a supplier has supplied movable goods in terms of a sale agreement and has exported the goods.

(b) In terms of the Regulations tax shall be charged at zero *per centum* in two situations:
  (i) where goods are consigned or delivered in terms of para (a) in the definition of "exported" i.e. direct exports;
  (ii) where goods are consigned or delivered in terms of paragraph (d) in the definition of "exported" i.e. indirect exports, but subject to the proviso;

(c) The word "exported" means consigned or delivered by the registered operator to the recipient at an address in an export country as evidenced by documentary proof acceptable to the

Commissioner. To consign is defined in the Concise Oxford dictionary as “to hand over or deliver to”.

(d) “Exported” in terms of paragraph (d) in the definition section means removed from Zimbabwe by the recipient, who is not a resident of Zimbabwe, for conveyance to an export country, subject to such conditions as may be set by the Commissioner.

(e) “Export country” means any country other than Zimbabwe but includes any part of Zimbabwe declared to be an export processing zone.

The facts giving rise to the dispute the subject of this application are not entirely clear but a perusal of the papers filed reveals the following. That goods were purchased from the applicant by a foreign resident and subsequently conveyed outside Zimbabwe. It appears the cost of transportation of the goods was paid for or arranged by the foreign resident. The respondent in paragraph 12 of his heads says the foreign resident collected the goods himself. This statement has not been disputed although the applicant says in its heads that it ensured that the goods left the country and prepared all necessary documentation in this regard.

The issue that arises is whether the goods were exported (as defined) by the applicant as the supplier. There is no evidence that the applicant itself consigned or delivered the goods at an address in an export country and indeed the applicant did not supply such evidence. All there is on the papers is an unsubstantiated statement that it did so. The *onus* is on the applicant to prove that it did export the goods as defined. It has not discharged that onus. To the contrary the respondent has stated that the purchaser himself collected the goods, paid and arranged for their transportation and

thereafter received the goods in his country. The applicant obviously would have assisted in ensuring that the goods were transported in accordance with the arrangements made by the purchaser. In short no documentary proof which evidences the exportation of the goods by the applicant has been produced.

I do accept that section 11A of the Value Added Tax (General) Regulations SI 273/03 as amended by the Value Added Tax (General Amendment) Regulations SI 201/04 would cater for a situation where the foreigner himself removes the goods from Zimbabwe. The amendment now provides that in that situation the goods too shall be charged tax at zero *per centum* provided certain conditions are met. However there appear to be two difficulties with section 11A of the Regulations. The first is that it contradicts section 10(1)(a) of the Value Added Tax Act in that it provides for zero-rating even in a situation where the goods have been removed from the country by the purchaser himself and not by the supplier. Section 11A of the Regulations would therefore appear to be *ultra vires* the Act. The second difficulty is that section 11A would not in any event apply in the present case. Section 11A was promulgated on 24 September 2004. The dispute giving rise to this application was sometime before that. Section 11A does not have retrospective effect.

In the result I find that the respondent was entitled to demand that the applicant as the supplier or registered operator pays the value added tax.

Two other issues were raised by the applicant. For completeness of the record I will also deal with them.

The first is estoppel. The applicant argued that the respondent is “estopped” by the actions of his subordinates from denying that the applicant’s interpretation of section of the Act is correct. I do not accept this submission. What the applicant is saying is that

irrespective of the correct interpretation, the fact that the respondent's employees accepted that the goods in question were zero rated estops the respondent from arguing to the contrary. As a matter of law that cannot be correct. If an interpretation of the law is not correct, then that interpretation is not correct. The fact that respondent's employees may not have looked into the matter more carefully cannot estop the respondent from arguing that such interpretation is not correct.

The second relates to the submission by the applicant in paragraph 13 of its heads that in the event that this court finds that estoppel does not apply the applicant should nevertheless be entitled to payment of the sums claimed as damages for misrepresentation. This submission must also fail for the reason that the submission, made for the first time in the heads of argument, introduces a new cause of action i.e. damages for negligent misrepresentation. This cause of action does not form part of the applicant's founding affidavit. It is trite that an applicant must stand or fall by his founding affidavit. The misrepresentation is in any event denied by the respondent. Further this court cannot allow such a submission to be raised for the first time in argument in view of the obvious prejudice to the respondent.

For the above reasons the application must fail.

The application is therefore dismissed with costs.

Byron Venturas & Partners, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners.